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NO. 218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellants,

VS.

ROWAN & NICHOLS OIL COMPANY, *Appellee.*

BRIEF FOR APPELLEE

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Rowan & Nichols Oil Company.

Commercial Recorder—Fort Worth, Texas—2-5398

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BRIEF FOR APPELLEE

STATEMENT OF THE NATURE OF THE CASE

(1) Application of the order in question.

The order complained of fixed the field allowable at 690,000 barrels, which was allocated as follows: (1) each well capable of producing as much as 20 barrels of oil per day was allowed to produce that amount, regardless of the size of the tract upon which it was drilled or position on the structure, and under (3) below an additional amount; (2) each well incapable of producing 20 barrels per day (so-called marginal wells) was allowed to produce to the maximum of its capacity (there were 514 such wells which produced daily a total of only approximately 6,246 barrels, or

about one per cent of the daily field allowable) (R. 542); (3) each well in the field capable of producing more than 20 barrels per day, in addition to the 20 barrels provided for in (1) above, was allowed to produce an additional amount on the basis of the product of such well's hourly potential times its bottom hole pressure times the thickness of the saturated Woodbine sand underlying the well times the average number of acres per well in the lease, divided by the sum of such products for all of the wells in the field. (R. 5, 6, 324).

At the time of the trial of this case, there were 25,456 wells in the field, each of which was capable of producing more than 20 barrels per day. The allocation of a flat, arbitrary minimum allowable of 20 barrels per day to each of these wells plus the approximate 6,245 barrels produced daily from the marginal wells absorbed approximately 514,000 barrels of the daily field allowable of 690,000 barrels. Therefore, there remained from the daily field allowable only approximately 176,000 barrels to be allocated among the approximately 25,500 non-marginal wells on the basis of (3) above.

The net effect of the order and plan of proration herein involved was to distribute approximately 75% of the daily field allowable on an arbitrary, flat per well basis, leaving only approximately 25% of the daily field allowable to be allocated on the factors mentioned in (3) above. (R. 353). To the extent of three-fourths of the daily field allowable the distribution was made without regard or consideration to the differences in the property ownership of the respective opera-

tors, in disregard of the statute requiring distribution on a reasonable basis, as measured by vested property rights. In this, Appellee contends the plan is contrary to the Texas statutes and Constitution, and the Constitution of the United States.

(2) Contention of Appellee.

Appellee alleged that it owned the seven-eighths working interest in a 28.25 acre tract of land situated in the Castleberry League in the heart of the East Texas field, commonly referred to as the "fairway," that portion of the field where the oil sand is thickest, *the reserves the largest* and *the position on the structure the most favorable*, and that it had drilled seven wells on such lease. (R. 2). That said wells were more than sufficient to reasonably drain said lease, since one well would reasonably drain at least ten acres in such field, and that the spacing pattern fixed by the Commission for said field was the equivalent of one well to ten acres. (R. 3). Appellee alleged that under the well settled law of Texas, it was the owner in severalty of the oil and gas in place beneath its lease, and that it was entitled to an opportunity equal with that of other operators in the field to produce its fair share of the oil from the common reservoir. That a wealth of information was available to the commission and the public generally with reference to conditions in the field, and especially the oil reserves, and that said reserves could be measured with a degree of accuracy more than sufficiently precise to establish a basis for an *equitable* and *reasonable* allocation of production to the owners of oil and gas in place as

required by law,[1] so as to accord to each operator an equal opportunity to recover his fair share of the oil. (R. 5).

It was contended by Appellee that under the statutes and Constitution of Texas it was entitled to its fair share of the oil, measured by its "favorable position and amount of its acreage, the sand thickness, bottom hole pressure, and other proper determinable factors of ultimate recovery therefrom, without committing physical waste and without unreasonably interfering with others in the enjoyment of their properties located in said field and consistent with the reasonable requirements of public welfare." Appellee contended that the present order and plan of proration does not allow it to produce its fair share of the oil, but on the contrary, results in an unreasonable distribution of the field allowable, with the result that Appellee is more severely restricted in its production than other operators and its oil is being drained from its lease and produced by other operators, thereby injuring Appellee's lease. (R. 10).

(3) Nature of Appellee's injury.

The undisputed testimony showed that Appellee has lost in the past and will continue to lose in the future a very substantial amount of oil, and as a matter of fact, as said by the trial Court, "The present injury to each of them is clear, practically admitted." The undisputed evidence and findings showed it had al-

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[1]See Article 6049c (Appendix, p. 66.), requiring the allocation of the allowable among the producers on a reasonable basis.

ready lost by drainage over 200,000 barrels, and would in the future lose several hundred thousand more. (R. 227, 477, 543, 548).

The testimony and findings show that at the present rate of recovery, it would take Appellee more than twice the life of the field to produce its oil, and that water will undermine its lease long before areas to the east of Appellee's lease cease producing. It was shown and found by the Court that no reason was given why other leases similarly situated to Appellee's were permitted to recover their oil now, whereas they will produce in the future just as long from the same position on the structure and under the same conditions as Appellee, and admittedly will, because of the plan of proration in force, be allowed to produce much more oil per acre than Appellee. (R. 540, 546). The position taken by the Appellants that Appellee may in the future ultimately recover its oil, was so devoid of foundation in theory and in fact that the trial Court remarked: "We regard that contingency as so uncertain as to make it our duty to look principally to the present operation and to say that they have established such an injury in its nature irreparable."

The evidence was clear, and, except as to a few isolated statements (repeatedly cited in Appellants' brief) by witnesses, which were either modified, explained, or retracted on cross-examination or re-direct examination, and except for an occasional opinion unsupported by accurate scientific facts testified to even by the same witness, the evidence was undisputed, and the trial Court so found. (R. 550). Likewise, the trial Court found that there was no substantial evi-

dence to support the order. (R. 550). Appellants do not rest their case on any of the findings of the Court, but on their interpretation of a few isolated statements of witnesses, which the Court discredited by its findings. The statement of the case, therefore, from a factual standpoint, will be made by Appellee almost exclusively from the findings of fact, and on all important points, references will be made to the record where testimony of the witnesses, including those of Appellants, as well as Appellee, will be found, undeniably supporting the findings. References to the findings and conclusions of the Court are in bold face type. It is interesting to note, likewise, that the Findings of Fact made by the trial Court in this case were of facts which have not only been accepted by numerous State[2] and Federal Courts[3] in prior cases, but are in many instances facts of which the Supreme Court of Texas has taken judicial notice.[4]

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[2]Railroad Commission v. Bass, 10 S. W. (2d) 586, 588.

[3]Peoples Petroleum Producers, Inc. v. Smith et al., 1 Fed. Supp. 361; Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55, 81 L. Ed. 510.

[4]Brown v. Humble, 126 Tex. 309, 83 S. W. (2d) 935.

The Supreme Court of Texas, in Brown v. Humble, supra, found that in this very same field, "It is now, however, recognized that when an oil field has been fairly tested and developed, experts can determine approximately the amount of oil and gas in place in a common pool, and can also equitably determine the amount of oil and gas recoverable by the owner of each tract of land under certain operating conditions."

The Supreme Court of Oklahoma, in Patterson v. Stanolind, 182 Okla. 155, 77 Pac. (2d) 83, Cert. Den. 305 U. S. 376, likewise took judicial notice that the reserves in practically every oil field can be ascertained with reasonable accuracy.

See also Summers, "Does the Regulation of Oil Production Require the Denial of Due Process and the Equal Protection

(4) General Nature of East Texas Field and General Operation of the Order

The facts with reference to the nature of the East Texas field found by the trial court (R. 534), will not be repeated here, because this Court, we believe, is already familiar with the general conditions in and the nature of the field. The three judges of the trial Court unanimously made pertinent findings. One of the judges was formerly Attorney General of Texas and for four years handled litigation involving the Railroad Commission and proration orders for this field. The other two judges have sat in numerous cases in which proration orders have been under consideration. The Court found:

> "There is an intercommunication between all parts of the reservoir, thus permitting rather free movement of oil and gas from one portion to another. The fluids flow from areas of higher to areas of lower pressure, resulting not only in local migration of oil, but as the field is produced, the pressure of the waterhead at the west causes a general movement of oil upward and to the east. A well drilled into the reservoir and operated under proper conditions of control of reservoir pressure will effectively drain an area of at least ten acres. (R. 536). The number of acre feet of net effective oil sand in the field or in a lease in any portion of the field can be determined actually and relatively with reasonable accuracy. Likewise can the quan-

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of the Laws," an address delivered before the American Bar Association in Philadelphia September 10, 1940, copies of which are being filed with the Clerk of this Court or with the Library of Congress, since the same has not yet been printed in the Journal of the American Bar Association.

tity of oil per acre foot of net effective oil sand and the quantity of recoverable oil in the field and in the various leases be determined. This is done continually for taxing authorities, loans, sales, and similar purposes." (R. 536).

If a line were drawn through the approximate center of the field along the north to south axis of the field, it would mark the approximate center of the area of maximum thickness of the oil saturated sand, and is more or less the center of what is called the "fairway," or best part of the field. Appellee's lease is in the fairway or middle third of the field and some 3,500 feet west of the above mentioned line. This area is most favorably situated on the structure because of its thick sands of high permeability and porosity, large oil reserves, high potentials and high bottom hole pressure; and either under open flow or under a plan of proration based on reserves, position on the structure, or similar factors, this area of the field would receive the benefit of its natural advantage over the east and west sides. (R. 536). Under the order attacked in this case, this advantage is taken away and given to the the less productive parts of the field (R. 537).

Density of wells measured by surface acreage means very little unless every acre in the field had the same amount of oil under it, whereas in the East Texas field the saturated sand varies from a few feet in thickness to approximately 100 feet in the vicinity of Appellee's lease. (R. 538). Density, therefore, measured by the number of wells per hundred acre feet of sand or per hundred barrels of oil, is the only standard by which the mention of density has any meaning. For illustra-

tion, the average surface acreage density of the field is one well to 5.17 acres, while Appellee's surface density is one well to 4.03 acres. On the basis of density per hundred acre feet of sand, however, the field is drilled to an average density of one well to 192 acre feet, whereas Appellee's lease is drilled to only approximately one-half that density, or one well to 375 acre feet. Appellee's part of the minimum allowable of 20 barrels per well per day is only 20 barrels per 375 acre feet, whereas the average for the field is 20 barrels per 192 acre feet of sand, or twice as much as Appellee's. (R. 538).

There are many small tracts and many closely drilled tracts throughout the field, and these small tracts are not limited to one well, but many of them, in poor parts of the field and not exceeding two or three acres in area, owned by a single company, have more wells on them than Appellee has on approximately 28 acres. (R. 469-479, 540). Although Appellants have subtly indicated that these are isolated cases, the Findings of Fact, exhibits, and testimony do not support, but refute such a statement. (R. 540, 469, et seq.).

Since these densely drilled areas are not confined to any particular part of the field, it is quite apparent "*the condition does not exist as a result of an attempt to conserve the oil and gas.*" (R. 540, 541).

This plan of distribution, therefore, results in the unnecessary drainage of Appellee's lease. It will prevent Appellee's ultimately recovering its proportionate or fair share of the recoverable oil either originally or now in place under its lease. (R. 537). To say that eventually, or at some distant time in the future, by reason of

what is called by Appellants the "time element," Appellee will get its fair share of the oil, when operators in a stone's throw of Appellee's lease are taking Appellee's oil and yet will produce in many instances just as long, and in many instances, much longer than Appellee's lease, is too speculative to warrant its acceptance as fact. (R. 525).

The Court found that *"There was not any evidence to support an order which so discriminates between operators, and there was not any showing of any finding by the Commission or evidence to support any finding by the Commission that would justify such discrimination among operators."* (R. 540).

The average production in the field per hundred acre feet of sand is 13.28 barrels per day, while Appellee, with the best properties in the field, is permitted to produce only 10.11 barrels per hundred acre feet of sand, or about 76% of the average in the field. The sand thickness of Appellee's lease is twice that of the average of the field. (R. 541).

The Commission, by promiscuously granting unnecessary permits, the reasons for which not having been made to appear in this record, has caused the drilling of 15,000 unnecessary wells, most of which could be closed in now without creating waste. (R. 241, 544). The closing in of such unnecessary wells would leave operators with wells sufficiently adequate to drain their property. These unnecessary wells take up 300,000 barrels of the daily allowable as a result of the 20 barrel minimum, and all of them have long since been paid out

and enjoyed a splendid profit,[5] and a large number of them have as much oil as ever in place, although not necessarily as much recoverable oil. (R. 545). Notwithstanding this, the Commission continues to grant additional permits (R. 544) to certain persons, while it *has denied additional permits to this Appellee, who had only 5 wells on 25 acres.* (Rowan & Nichols Oil Company v. Railroad Commission of Texas, et al., 28 Fed. Supp. 131, 137).

SUMMARY OF ARGUMENT

(1) The decision of this Court in Railroad Commission of Texas, et al. v. Rowan & Nichols Oil Company, 310 U. S. 573, was not decisive of the issues in this case, the order in that case being materially different from the one here under attack, and under the order here involved Appellee suffers a greater degree of discrimination in that it receives a smaller percentage of the allowable oil under said order than under the old order in the first case.

(2) Under Texas law the owner of land owns the oil and gas in place thereunder, and under the conventional form of oil and gas lease, such as is involved in this case, the lessee owns the oil and gas in place, and is entitled to a fair chance to recover the same, or its equivalent in kind, or otherwise stated, to an equal opportunity with other operators to realize for his leasehold.

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[5]At the trial, it was admitted that with the 20 barrel minimum, wells pay out in two years. What other investment will pay out in such a short time even in other oil fields? Only 400 wells were drilled last year and they too are paid out by now.

(3) The present order of the Commission, allocating approximately 75% of the allowable on a per well basis, which, as to such 75% of the allowable, admittedly gives no consideration to reserves under the respective leases, ability of wells to produce, pressures, sand conditions or density of drilling on the respective leases, ignores the differences that would have to be taken into consideration in arriving at any reasonable or equitable distribution of the allowable. Such order results in waste by causing premature encroachment of water and low pressure areas; and is arbitrary, unjust, unreasonable, and confiscatory, in that it operates to deny Appellee the equal protection of the law and to take Appellee's property without due process of law, and is in contravention of the laws of Texas.

ARGUMENT

PROPOSITION I.

The decision of this Court in Railroad Commission of Texas, et al. v. Rowan & Nichols Oil Company, (No. 681), 310 U. S. 573, was not decisive of the issues in this case, the order in that case being materially different from the one here under attack, and under the order here involved Appellee suffers a greater degree of discrimination in that it receives a smaller percentage of the allowable oil under said order than under the old order in the first case.

In the first case, this Court ruled that the issue presented for adjudication was whether a distribution based on potentials was as fair as one based on acre feet of sand or reserves, and that such issue is a ques-

tion for administrative and not judicial judgment. That issue is not here involved.

The Appellee admits that the Commission has the discretion to adopt a formula for distribution of the field allowable among the respective producers, but submits that whatever formula is adopted, to be valid, the effect thereof must bring about a reasonable distribution among producers; otherwise, the order would certainly violate the Texas statute.

In this case, that part of the formula, except the 20 barrel allowance, was not complained of, but, on the contrary, was commended by Appellee, and the Trial Court in the early stages of the case observed that the gravamen of Appellee's complaint was the arbitrary allowance of the 20 barrel minimum to every well, regardless of the number of other wells the producer might have had on the smallest of tracts, and regardless of the potential or bottom hole pressure of the well.

The order under attack is more discriminatory and confiscatory as to Appellee than the order involved in the first case. The question of injury suffered by Appellee is one to be decided by the trial Court on the preponderance of the evidence. In this case, testimony on this issue is undisputed. The trial Court, in its opinion, observed that injury was practically admitted. (R. 525).

The top daily field allowable of the order attacked in the first case was 522,000 barrels, 7,000 barrels of which were allocated to the better wells. In this case, and under the present order, the Commission has increased the top daily field allowable to 690,000 barrels. How-

ever, instead of allocating to the poorer wells on the poorer properties, and to the wells on densely drilled tracts, only the 20 barrels daily as was done under the former order, this order allocates to every well in the field, even to those that can produce only 25 to 30 barrels a day, a proportionate part of the allocable oil. The net effect of this order is not to increase the percentage of the allocable oil to Appellee, as would seem logical with an increased top daily field allowable, but on the contrary, it decreased such percentage (R. 201, 202, 207).

The trial Court found:

> "While the Commission increased the daily allowable and thereby gave plaintiff more oil each day, all other wells that could produce it got more oil, and plaintiff's ratio of the daily field allowable remained practically the same. Under the order of June 19, 1939 (the order under attack in the first case), if the then allowable of 522,000 barrels had been increased to 690,000 barrels (as in the present case), plaintiff would have been allowed to produce more oil than under the present order. Under the present order, plaintiff gets 68/100,000ths of the proratable oil. Under the order of June 19, 1939, it got 200/100,000ths of the proratable oil." (R. 543, 201-207).

True it is that under the present order Appellee is allowed more barrels per producing day, but the number of producing days has been reduced. Likewise, while Appellee is getting an increase in daily allowable, practically every other operator and every well in the field, including marginal wells, were given an increase. Drainage and discrimination are more pro-

nounced than ever. Under the order in the first case, the so-called marginal wells were closed in with all other wells in the field on regular shutdown days. (R. 216). Under the present order, marginal wells are relieved from the shutdown orders and are permitted to produce seven days a week. This, together with the 20 barrel minimum allowance to all other wells, of necessity results in raising the top daily field allowable from 522,000 barrels per day (as was true in the first case) to 690,000 barrels per day under the present order. The present order increases the daily allowable 170,000 barrels. It increases the amount of allocable oil from approximately 7,000 barrels per day (as was true under the old order) to 176,000 barrels per day. (R. 200, 201, 202). On the other hand, good wells like Appellee's are shut down at least three days a week. (R. 216). Thus, every increase in the top daily field allowable under the present order accentuates the degree of discrimination against Appellee.

In the present case, the order is more discriminatory for another reason. Instead of arbitrarily giving practically every well in the field only 20 barrels per day, the Commission gives every well that will make it 20 barrels, then, notwithstanding the fact that a well can be operated profitably on substantially less than 20 barrels a day, and even pay out its cost, an additional amount is given to each well in the field, regardless of its low capacity or oil reserves (R. 353). Under the old order, such wells would not have been given but 20 barrels by reason of their lower potentials. As an example, the Wood well, immediately adjoining Appellee's lease, and which is located on approximately one-third of an

acre, instead of being allowed 20 barrels, is allowed more than 24 barrels per day. (R. 478). This is approximately twenty per cent more than the minimum. Appellee's "B" lease, with only one well to 5 acres, has a daily allowable of only 37 barrels, instead of an allowable fifteen times greater than the Wood well. If these wells were produced in any reasonable relation to reserves, the Appellee's well would produce 360 barrels instead of 37, as compared with Wood's 24 barrels per day. The discrimination here is quite apparent since the evidence shows that the sand thickness, bottom hole pressure, potential, position on structure, etc., are practically identical on both tracts. (R. 476, 478).

Another distinction between this case and the first Rowan & Nichols case lies in the fact that in the first case, this Court understood from the record that there was a dispute between the witnesses as to whether or not reserves can be calculated with a dependable degree of accuracy, while in this case, that they can be so calculated is admitted by all. In the first case, this Court treated the lower Courts' actions as substituting their judgment for that of the Commission, whereas in this case, the lower court has enjoined the enforcement of the order because it does not provide for distribution of the field allowable on a reasonable basis as required by the Texas law and because there was not any substantial evidence to support it. (R. 539, 540, 550).

In the first case, there were only 451 marginal wells out of approximately 26,000 wells in the field. These wells produced only 5,250 barrels per day. This was approximately one per cent of the daily field allowable. The amount produced by them was insignificant. The

trial Court in that case found that the same did not affect, and should not be permitted to control, the plan of proration in the field.[12] However, in disposing of the case, this Court obviously decided a case not here involved, as shown by the following language from its majority opinion:

> "But the practical operation of this order was largely cut across by allowances made to 'marginal wells.' These are wells which if their low productive capacity were legally curtailed, would have to be prematurely abandoned. Therefore, the Texas statute gives them a special status. In accord with its policy toward these marginal wells, the Commission freed them from the burden of its hourly potential formula by allocating them production up to 20 barrels a day. Because of the large number of these low capacity units in the East Texas field, approximately 385,000 barrels (which, in fact, was only 5,250 barrels) out of a total daily allowable of 522,000 barrels were exempt from the restricting formula, leaving only about 136,000 (in fact, only 7,000) for the class within which Respondent's wells fell." (Parentheses ours)[11]

Since the Court unquestionably misunderstood the facts in the first Rowan & Nichols case,[12] the issue there passed upon is not here involved, and the decision in that case is not controlling in this case.[13]

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[11]310 U. S. 573, 84 L. Ed. 983.

[12]Rowan & Nichols Oil Company v. Railroad Commission of Texas, et al., 28 Fed. Supp. 131.

[13]Summers, "Does the Regulation of Oil Production Require the Denial of Due Process and the Equal Protection of the Laws," supra.

Appellee believed that in the first case, there was no substantial dispute in the evidence, but in this case, Appellee is certain of the lack of any conflict on the material facts. In this statement, it is not only supported by the record, but by the findings, conclusions and opinion of the trial Court. (R. 550). The witnesses for both Appellants and Appellee were not in contradiction regarding the physical facts in the field or regarding the favorable position of Appellee's property and its reserves. It is admitted that three-fourths of the field allowable is distributed without regard to differences in properties and density of drilling, but solely on a per well basis, which constitutes no measure of property rights. Such an allocation assumes that every well and every property, regardless of where situated, are just as good as every other well and property, and the effect is to restate the law of property that a leaseowner's lease value and his right to produce therefrom depends on the number of wells he has been able to drill under permits granted by the Commission, rather than the quantity of oil that is beneath his land. The remaining one-fourth of the daily allowable is almost as arbitrarily apportioned because the poorest well, which will produce only 25 to 30 barrels per day, is given the same 20 barrel minimum as the best well with a daily potential of 20,000 barrels, and in addition, the poor wells are then complemented with an additional part of the 176,000 barrels of allocable oil. The undisputed testimony shows and could show nothing other than that, these densely drilled and poorer properties, or at least a large part of same, not only discriminate against Appellee's prop-

erty, but by yirtue of their disproportionate withdrawals, are draining and confiscating Appellee's property, and the trial Court so found. "There really is little or no dispute in the evidence" (R. 548) and "the record shows virtually no dispute as to the facts." (R. 550).

> "There was not any evidence to support an order which so discriminates between operators, and there was not any showing of any finding by the Commission, or evidence to support any finding by the Commission, that would justify such discrimination among operators as results from the order in question." (R. 540).

The Court concluded as a matter of law that:

> "There was no substantial evidence to support the Commission's order and there was no showing made that the Commission had based the order on any finding, and there was no substantial evidence to support a finding upon which the order could be based." (R. 550).

The above findings of fact and conclusions of law clearly show the distinction between this case and the first case, for the reason that under the first case, this Court assumed in its opinion that there existed substantial conflict in the evidence on the material facts. Here no such conflict is to be found, and the trial Court clearly demonstrated its familiarity with the substantial evidence rule cases. This is a much stronger case on the record than that of Thompson v. Consolidated Gas Utilities Corp., et al., 300 U. S. 55.

The trial Court spent practically a week in an arduous and meticulous trial of this case. The judges, having tried numerous cases involving similar matters, found that there was practically no dispute in the testi-

mony on material facts. However, even if the trial Court was mistaken in such finding that the testimony was undisputed, the record reveals that the testimony is in fact overwhelming in favor of the trial Court's findings, and there was no substantial evidence upon which reasonable minds could differ to support the action taken by the Commission in promulgating the order involved. These judges certainly were most familiar with the holdings of the Texas Courts, the Texas rule of property, and the limitations placed upon the Railroad Commission by the decisions of the Texas Courts. *Texarkana v. Arkansas-Louisiana Gas Co.*, 306 U. S. 188, 198. In the findings of fact, and in the conclusions of law, the trial Court sustained Appellee on the question raised under the local law.*

PROPOSITION II.

Under Texas law the owner of land owns the oil and gas in place thereunder, and under the conventional form of oil and gas lease, such as is involved in this case, the lessee owns the oil and gas in place, and is entitled to a fair chance to recover the same, or its equivalent in kind, or, otherwise stated, to an equal opportunity with other operators to realize for his leasehold.

(1) Statement of Texas law of property in oil and gas.

Texas follows the absolute ownership view with respect to the property right in crude petroleum oil and

*Mr. Justice Reed said: "This court looks to the trial court for the original examination of local questions and relies for aid upon the explanation of its conclusions."

natural gas. The landowner is regarded as having absolute title to the oil and gas beneath his land. *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 305, 83 S. W. (2d) 935, 940; *Thompson v. Consolidated Gas Utilities Corp., et al.*, 300 U. S. 55, 68, 81 L. Ed. 510. Under the law and practice of taxing authorities, he pays taxes on it. (R. 536). *Stephens County v. Mid-Kansas Oil & Gas Co.*, 107 Tex. 226, 113 Tex. 160. Since the property owner owns the oil and gas in place, it necessarily follows that he must be given the right to the use and enjoyment thereof. To protect this right, the Texas Legislature has provided by statute that the Railroad Commission must, in allocating the oil between producers, do so on a "reasonable basis."

(2) Duty of the Railroad Commission under statute.

The effect of the Texas Statute is to prohibit the Railroad Commission from allocating the top daily field allowable as between producers on any basis other than a "reasonable basis."[14] Any method of allocation so adopted by the Commission must not jeopardize nor infringe upon such property right beyond that which the necessities of the case require. Certainly Appellee should be allowed by the order to produce in some reasonable, although not exact, relation to its reserves. The trial Court said "We do not say that

[14]Article 6049c, Section 7, Revised Civil Statutes of Texas for 1925. (Appendix, p. 66). The Supreme Court in effect construed this statute as requiring the equitable allocation of the allowable among the various producers in Brown v. Humble, supra. Compare the language of the Supreme Court of Texas in this case (Page 26) with the language of Judge Hutcheson in the prior Peoples Petroleum Producers, Inc. v. Smith case (Page 22, infra).

either presently or ultimately each lease must be allowed to produce in exact proportion either to its present or original oil in place." (R. 527). Appellee does not make the point that the top daily field allowable is not a waste prevention measure, but the Commisson having seen fit to set a top daily field allowable to prevent waste, it then becomes the plain duty of the Commission to allocate such allowable between operators and producers on a *reasonable, just and equitable basis.* To make such a reasonable allocation, the Commission must necessarily take into consideration the material factors incident to the production of oil and the reserves of leases, and when no material factor is considered, and the allocation is made on some basis wholly unfounded in sound, accurate, scientific facts which are capable of fairly accurate ascertainment, and in derogation of property rights, the allocation is not on a "reasonable basis." *Lilly v. Conservation Commission of Louisiana*, 29 Fed. Supp. 892, 893, 897; *Peoples Petroleum Producers v. Smith et al.*, 1 Fed. Supp. 361.

The material factors just mentioned must be assumed to be hourly potential and bottom hole pressure of wells, thickness of the saturated Woodbine sand, and the number of acres in the lease, because the order complained of, in distributing the allocable oil, does so, on this basis. (R. 24). Thus, there certainly is an implied finding that these are the necessary or at least proper factors upon which the distribution should be made. However, instead of distributing the allowable under the statute on these factors, the order arbitrarily allocates only one-fourth on such basis, and the other

three-fourths is allocated without consideration of any of these factors. The Court found that the regulation did not

> "allocate or distribute the allowable production for the field on a reasonable basis, and is arbitrary, discriminatory, confiscatory and unreasonable as applied to plaintiff. It denies to plaintiff a reasonable opportunity to recover its fair share of the oil ultimately, much less within a reasonable time, resulting in a daily loss of much oil worth several hundred dollars * * * and results daily in a preventable drainage of oil from plaintiff's lease to the leases of other operators." (R. 155, 409, 548).

The Commission has theretofore acted in derogation of the statute, and as pointed out by Judge Hutcheson in the Peoples case, supra,

> "*In direct contravention of the statute, instead of justly and equitably distributing the reduction ordered*, it has, through its per well requirement, so arbitrarily, unjustly, and in a confiscatory way, distributed it, as that it will inevitably take the oil of plaintiffs, situated as they are most favorably on the structure, to give it to others not so favorably situated."

In the later case of *Henderson v. Terrell et al.*, 24 Fed. Supp. 147, the Court said:

> "* * * or, as we have put it in other cases, statutory proration must be made upon the basis of the actual, rather than the theoretical conditions, and must take due account of the characteristics and attributes of each well and tract of land."

The only duty, therefore, that the Commission has exercised in the promulgation of this order is in the fixing of the top allowable, which is not complained of by Appellee. (R. 23, 525). Instead of acting in pursuance to the statute and the well established law of Texas, after having fixed the top allowable, by distributing it on a reasonable basis with proper deference to property rights, the Commission has, in direct contravention of the statute, allocated most of the allowable on the basis of the number of wells an operator has, thereby in effect raising the poorest wells and properties to the level of the best and reducing the best wells and properties to the level of the worst. In view of the undisputed testimony concerning the physical facts regarding the East Texas field, it will not be contended by any party to this case that the number of wells on a lease constitutes any measure of the lease owner's property rights under the Texas law.

The undisputed evidence in this case, supporting the findings of the trial Court, shows conclusively that the arbitrary method of allocating the allowable brought about by giving each well 20 barrels, regardless of density, position on the structure, or oil reserves, is wholly unnecessary to prevent waste. (R. 542). As found by the trial Court, no reason is given, nor is any to be found, justifying the giving of this 20 barrels to every well, regardless of how many wells may be on any one lease. In fact, the Commission has not even attempted to justify such action either as a waste prevention measure or as a means to protect property rights. The undisputed testimony wholly fails to support either. (R. 241, 544). If these wells were really

permitted to be drilled to prevent confiscation or waste why was Appellee, being drained by more densely drilled areas all around it, denied the right to drill to a similar density of Wood and others on its "B" lease? If they were granted to prevent waste why were so many unnecessary permits granted on the East side, where the Commission's own engineers admit that the excessive withdrawals, due to the great density and 20 barrel minimum, are causing the pressures to drop too rapidly and creating a gas cap? (R. 421, 422, 423, 424). Appellant suggests that Appellee could have appealed from each of the orders granting each of these 15,000 unnecessary wells. If Appellee had been relegated to such a prohibitive and confiscatory remedy, the Court would have dismissed its appeal because Appellee under the Texas cases could only appeal in those cases where it was practically an adjacent leaseowner. Its only practical and effective remedy, therefore, was to apply to the Commission for an adjustment of allowables, *Brown v. Humble*, supra; *Magnolia v. Blankenship*, 85 Fed. (2d) 553, Cert. Denied. Its application was filed, but many months passed after the hearing and the Commission never acted upon it. (R. 87, 438, 439).

Since one well will reasonably drain 10 acres in the field, additional wells on Appellee's lease are wholly unnecessary to get its oil, and to force Appellee to drill additional wells would further confiscate its property, (R. 549), and since others would then seek additional permits within only a few months its situation would be just as aggravated as ever. This demonstrates the futility of trying to allocate the allowable in a field such as this, where there is no uniformity of spacing,

on a substantially per well basis, because the number of permits an operator has been able to secure can be no measure of his reserves or position on the structure. Unless wells are evenly spaced so that each operator has the same number of wells per acre and the reserves and ability of wells to produce on each tract are exactly the same, any allocation on substantially a per well basis is bound to be discriminatory or confiscatory and is not on a reasonable basis. By granting numerous unnecessary permits for wells and then allocating the allowable to all wells on a substantially per well basis, the Commission in effect rewrote the law of property, and such action on the part of the Commission is one that cannot be sustained by the courts either in law or reason.

With all of the wells having been paid out by now, the adoption of an equitable order would not be difficult. (R. 547). As a matter of fact, the order in this case clearly gives consideration to reserves and position on the structure, but the 20 barrel minimum will not permit the order to operate so as to reasonably distribute the allowable.

In the few cases where it was advisable for the Commission to grant excessive permits on small tracts, instead of requiring pooling,[16] the Commission should have reduced the allowable of such wells in conformity with the existing and calculable physical factors, as suggested by the Supreme Court of Texas in *Brown v.*

[16]Article 6014, Paragraph (g), Revised Civil Statutes of Texas for 1925, provides that all of the separate properties in one field cannot be unitized under one management, but it does not prevent the pooling of small tracts. Tysco v. Railroad Commission, 12 Fed. Supp. 195.

Humble.[17] This can be done now. Where numerous tracts were so small that there was not sufficient oil thereunder to justify the expense of drilling or operating a well, the Commission should have required the pooling of same or denied permits therefor.[18] This can be done now. Certainly the Commission should not require those operators, such as Appellee, who knew the oil business and bought large reserves on the best part of the structure in the early life of the field, to contribute to those who spent smaller sums of money for town lots and strips in the less productive portion of the field. Some operators were able to obtain permits for as many as ten wells per acre, while operators like Appellee were permitted to drill only 5 wells on 25 acres. Under the present order of the Commission, Appellee is required to contribute a part of what it owns to those operators who are now getting not only more than their fair share of the allocable oil, but will eventually get many times more than their reserves. This ridiculous result and practice was never intended by the Legislature, and constitutes the most apparent evidence of confiscation that can be imagined. Thousands of these unnecessary wells can be closed in and save all this unnecessary ex-

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[17]126 Tex. 296, 83 S. W. (2d) 935, 940. "But in all such instances, it is the duty of the Commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas."

[18]Summers, "Does the Regulation of Oil Production Require a Denial of Due Process and the Equal Protection of the Laws," supra. Walker, The Problem of the Small Tract Under Spacing Regulations, Bar Association, Texas Law Review, Oct., 1938, p. 157; Oil and Gas Journal, August 11, 1938.

pense of operation and at the same time lessen waste, drainage and confiscation. (R. 544).

If the Commission is insistent on arbitrarily giving each well a 20 barrel minimum, it has the remedy of increasing the allowable and decreasing the days of production and letting only the good wells and properties participate in the allocable oil, rather than permitting all poor wells and properties to enjoy the 20 barrel minimum and then also participate in the allocable oil.

Since Appellee, under Texas law, owns the oil and gas underneath its lease, it is entitled to the *present* reasonable use and enjoyment thereof with other operators in the field. Any order which permits one operator, with the same amount of reserves on the same part of the structure, and with reserves and production factors substantially equal, to recover his oil five times faster than another operator a few hundred feet away, is patently discriminatory, confiscatory, and denies the latter operator the equal protection of the laws. In fact, the Commission encourages and aids in the taking of Appellee's property without due process of law.

Without restriction by the Railroad Commission, under the rule of capture, Appellee would have been free to fend for itself, and by virtue of its large reserves and most favorable position on the structure, its property rights could have been protected, but now, since the right to fend for itself has been taken away from it, and it must content itself with the few permits it has been able to obtain, whereas other tracts in the field have been drilled to great density, the only way its prop-

erty right can be protected is for the allowable to be distributed on a reasonable basis whereby consideration is given to its large reserves and position on the structure. See Hardwicke, "Rule of Capture and Its Implications, as Applied to Oil and Gas," XIII Tex. Law Review, 401; Walker, "The Problem of the Small Tract Under Spacing Regulations," Texas Bar Assn., Texas Law Review, Oct., 1938, Page 157; Oil and Gas Journal, Aug. 11, 1938; *Peoples Petroleum v. Sterling*, 60 Fed. (2d) 1041, 1047.

The Legislature has not seen fit to delegate to the Commission the right to promulgate orders permitting operators to recover their investments even if it had the power. The power of the Commission is strictly limited by statute to the restriction of production in order to prevent waste. Allocation of production must be on a "reasonable basis." To permit the Commission to grant permits indiscriminately, thereby ignoring property rights which will be infringed upon as a result of such action, and then to guarantee the return of an operator's investment by the means of such arbitrary and plainly discriminatory orders, is nothing but restricting operators, like Appellee, while other operators appropriate their reserves under the guise of legal authority. Properties would be at the whim and caprice of an elective body, if such were permissible. As observed by the trial Court in its opinion: "If the proration is unreasonable, the statute does not give the Commission the authority to make it. If it is so unreasonable as to be arbitrary, the Constitution does not permit it to be done either by the Legislature or the Commission." (R. 526).

PROPOSITION III.

The present order of the Commission, allocating approximately 75% of the allowable on a per well basis, which, as to such 75% of the allowable, admittedly gives no consideration to reserves under the respective leases, ability of wells to produce, pressures, sand conditions or density of wells drilled on the respective leases, ignores the differences that would have to be taken into consideration in arriving at any reasonable or equitable distribution of the allowable. Such order results in waste by causing premature encroachment of water and low pressure areas, and is arbitrary, unjust, unreasonable, and confiscatory, and in effect operates to deny Appellee the equal protection of the law and to take Appellee's property without due process of law, and is in contravention of the laws of Texas.

(1) Present percentage of per well allocation.

There are 25,970 wells in the East Texas field. Of these, 521 are so-called marginal wells, which produce 6,245 out of the 690,000 barrel daily field allowable. The granting of this allowable to marginal wells is not complained of in this case. Appellee raised no question as to the formula of distribution provided in Paragraph (3) of the order. However, under the present plan, including as it does the giving of the 20 barrel minimum before the formula in Paragraph (3) of the order is allowed to operate, taking up three-fourths of the entire daily allowable, or approximately 509,000 of the 690,000 barrel daily allowable (R. 541), deprives the order of even the semblance of fairness or reasonableness. As a result of the 20 barrel minimum only the

remaining approximately one-fourth of the daily allowable is allocated on the basis of the factors of bottom hole pressure, potential, and acre feet of sand. The poor wells and properties having already been favored by being given the 20 barrels, are then again favored by being permitted to share in this 176,000 barrels of allocable oil.

(2) No reason given for 20 barrel minimum.

As found by the trial Court, no reason was offered by the Commission for the arbitrary 20 barrel minimum given to each well, regardless of whether its capacity be 20 barrels or 20,000 barrels per day and regardless of whether the density was one well to 10 acres or ten wells to one acre.

Since 1933, for reasons which must be obvious to this Court, the Commission in this particular field has fixed a per well minimum ranging as high as 40 barrels per day, and as the number of wells in the field has increased, the amount of the minimum has decreased. Since it was given to wells in every section of the field, it is apparent that it had nothing to do with waste prevention. (R. 405, 414).

For several years now the minimum has been 20 barrels, yet the price of oil has fluctuated and the shutdown days have been either increased or decreased. The Commission's chief engineer was not permitted in this case, over objection of the Attorney General, to testify as to why the Commission insisted on putting the 20 barrel minimum in each order. (R. 415.) The engineer for the Commission in 1933 on the witness stand

in this case testified that for nineteen months he endeavored to get the Commissioners to allocate the daily allowable on the basis of acreage, the result of which would have been to equitably and reasonably allocate the allowable and thus prevent unnecessary waste by preserving the pressure and preventing the uneven rise of the water table and the like in areas of dense drilling. However, the Commission insisted on keeping said field on a per well basis, regardless of property rights and regardless of the statute requiring the Commission to prevent waste. (R. 544, 547). It is quite apparent from the way the daily allowable has been fixed and the shutdown days required, that the average daily allowable has been fixed more with an eye to giving each well a 20 barrel minimum than to the preservation of pressures and the prevention of waste. (R. 414, 415).

The Commission has, therefore, by its orders, assumed a position paramount to the Legislature and the people of Texas, to whom it should be subservient. As time goes on, discrimination and confiscation will become more pronounced and aggravated because additional permits are being granted daily. (R. 241, 540, 544). Notwithstanding the present density of a lease or its position on the structure or the size of the tract, each new well is given its 20 barrel minimum and then an additional part of the allocable oil, although the Supreme Court held, in Brown v. Humble, that:

> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. Also, conditions may arise where it would be proper, just and right to

permit tracts to be subdivided and such subdivisions drilled after the adoption of the rule; *but in all such instances, it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to receive a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land.*"

(3) The 20 barrel minimum is arbitrary, discriminatory, confiscatory, and does not prevent, but is conducive to, waste.

It must be apparent to the Court that the 20 barrel minimum operates to the distinct advantage of the densely drilled tracts and to the uttermost disadvantage of those tracts less densely drilled, even though the latter have equally as great and sometimes much greater reserves.

The evidence shows that by reason of the operation of the order, the East Texas field has produced approximately 31.28% of the original reserves, while Appellee has produced only approximately 20.25% of its original reserves, in spite of the fact that Appellee was more diligent than most of the other operators and drilled its wells shortly after the discovery of the East Texas reservoir in 1930. (R. 227, 477, 538). Appellants devote a large part of their brief to the discussion of the fact that the surface density of the field is one well to 5.7 acres, whereas the density on Appellee's lease is 4.03. To compare average densities where some of the leases have less than 10 feet of sand, as

compared to Appellee's lease having approximately 100 feet of sand, is just as arbitrary as including in some leases condemned acreage with practically no oil sand at all. The average sand thickness in the field is 37.86 feet, whereas under Appellee's lease it is 93 feet, or more than twice as much. (R. 538). Such surface density comparisons are therefore of no weight, and engineers make density comparisons on the number of wells per hundred or thousand acre feet of oil sand. (R. 279).

Conditions of densely drilled leases adjoining sparsely drilled leases exist in all parts of the field and that fact is sufficient to condemn the per well distribution of the allowable as arbitrary and confiscatory.

In attempting to justify the 20 barrel minimum on the west side of the field, Appellants contend that an operator will have *his oil confiscated* if the allowable is reduced because the water is rapidly drowning out his well, yet on the east side the 20 barrel minimum is sought to be justified on the ground that oil will be left in the reservoir and *waste will occur*, unless it is given each well. On the other hand, Appellants admit that the producing of these wells on the west side, with a high percentage of water, dissipates the reservoir energy and unnecessarily creates waste. The Court so found. (R. 543). The evidence further shows that if the allowable of these wells were substantially reduced, or if they were closed in entirely, the oil would be recovered by other wells on the lease or by other operators to the east, thereby eliminating waste. (R. 105, 237, 238, 240, 244, 279, 344, 345, 396, 397, 398, 399,

400). Appellants then argue that on the east side of the field, it is necessary to permit these wells to produce at excessive rates in order to prevent their premature abandonment. If they are so produced, such east side wells will confiscate the reserves of Appellee and others. The more oil taken out on the east side, the faster and greater will be the migration of the oil from the fairway and properties on the west to replace the oil taken out on the east side. The trial Court found and the evidence conclusively showed that such east side wells may be reduced to an allowable substantially lower than 20 barrels per day without causing their abandonment and without creating waste. Such curtailment in the production on the east side would most certainly help maintain higher pressures, as it would in the densely drilled areas of the fairway also. The Appellants own engineer, Mr. Hudnall, testified that the 20 barrel minimum creates waste and that it should be reduced to at least 5 barrels. He testified:

"Q. Now on the east side is where you have the low pressures, isn't it?

"A. Yes, sir.

"Q. And the fact that you have the pressures now so low that the gas is passing out of the oil on the east side demonstrates, does it not, that the oil has been taken out on the east side faster than the water and the other forces can contribute to the pressure there again and build the pressure up and keep it above that point at which the gas passes out of the oil?

"A. *That is very conclusive; that is correct.*

"Q. There is no question about that in your mind?

"A. None whatever." (R. 398).

"Q. All right. Now, then, if the 20 barrel minimum were eliminated from this present formula or proration, and the field were prorated on the fraction without the 20 barrel minimum, that would mean less oil to be taken out currently out of the east side, would it not?

"A. Yes, I think it would."

* * *

"Q. Well, if instead of letting them produce a flat 20 barrels, say you cut them down to 5 barrels, then there would be considerable less oil taken out of the east side, wouldn't there?

"A. That is correct.

"Q. And the pressures would stand up longer?

"A. Yes, sir.

"Q. And the more you take out of the east side, the more you contribute to the dissipation of the energies that make possible the profitable production of oil in that field, isn't that true?

"A. Yes, sir."

In this connection, the Court observed:

"Since the east side is more densely drilled than some other sections of the field and since heavy withdrawals on the east cause the gas to go out of solution, it is quite apparent that the giving of 20 barrels to all of these wells unnecessarily draws upon the reservoir energy, all of which would be prevented substantially by reducing this

allowable to 5 barrels per well or 5 barrels per tract." (R. 544).

If in the first case this Court was of a view that the Commission's engineers gave evidence supporting the order, there is not any testimony from the Commission's engineers in this case that would give rise to such a view. The Commission's own engineers testified that the order also gives a distinct advantage to both the east and west sides of the field over the fairway, because on the west side, the original sand thickness is used in applying the formula; whereas a large percentage of the original oil saturated sand has been taken by the water as it has risen. On the east side, where all of the witnesses testified that the porosity and permeability are not as great as in the fairway, and where there are shale breaks, the same consideration is given to the acre feet of sand in that section of the field as is given to the highly saturated more porous sands in the fairway. (R. 277, 412, 413). What is reasonable or equitable in giving these east side wells the same 20 barrel minimum, when these wells will not pump over 20 or 25 barrels a day, the same allowable that is given wells such as Appellee's that will flow 20,000 barrels a day? One can produce a thousand times as much per day as the other and yet the Railroad Commission, when the allowable is allocated, gives such good well less than twice as much as the poorest.

If the Commission may or must maintain the minimum allowable of 20 barrels to each non-marginal well, notwithstanding the fact that some wells can produce a thousand times more oil per day than others, it must

be under a proration formula that avoids confiscation of property and preserves the correlative rights of the respective lease owners by allowing the better wells to produce proportionately more than wells of low productive capacity, and the formula must protect the less densely drilled leases from the inequality they would suffer as compared with the more densely drilled, because of the 20 barrel minimum to all wells. The present order does not give such protection to the better wells and less densely drilled leases. This protection can be given to such better wells and less densely drilled properties by increasing the shutdown days to four or five days per week, and allowing the field to produce in some two or three days the total present weekly allowable, and by restricting more of the wells to the minimum allowable and granting to the better wells and less densely drilled properties the resulting larger amount of proratable oil. (R. 541). That is to say, allow the field to produce in some two or three days the present weekly allowable of some 1,560,000 barrels, allow all non-marginal wells to produce the minimum of 20 barrels per producing day, but limit to the better wells and less densely drilled leases the distribution of that part of the allowable which would not be produced on the 20 barrel minimum, adopting some reasonable basis for dividing those that would from those that would not participate in the production of the proratable portion of the field production, thereby allowing the better wells and less densely drilled leases to produce in some reasonable relation to their capacity and reserves when compared with the weaker wells and more densely drilled leases. That is just what the

present plan does not do, and it is not only difficult, but impossible, to find a legal basis for a proration order that allows, as does the present plan, a one acre lease with five wells on it to produce substantially five times as much oil as an adjoining one acre lease with one well on it. A plan that so operates ought to be held invalid as a matter of law. Reasonable minds could not differ on the proposition that such a distribution is wanting in reasonableness and justice between lease owners. Logic and reason are powerless to sustain a plan that allows, as does the present plan, a lease owner with one-fifth the reserves of his neighbor to produce substantially five times as much oil as such neighbor, and any attempt to enforce such a plan is an attempt to arbitrarily exercise official power.

*The Court found that the "reasons or theory for giving the poorest wells on small or densely drilled tracts in the poorest part of the field, the same minimum allowable (20 barrels per day) as is given the best wells on large tracts in the best part of the field with a density of one well to 5 or 10 acres * * * are most vague and indefinite, and no substantial evidence was offered to justify any such plan or order, and there was no substantia. evidence upon which such an order could be based."* (R. 542).

The Court has made detailed findings on undisputed evidence to the effect that the 20 barrel minimum results in unnecessary waste. (R. 537, 541, 542, 544). It has done the same as to drainage and confiscation of Appellee's property. (R. 538, 539, 540, 541, 542, 543, 544, 545). It has likewise found that the arbitrary allocation to these wells of 20 barrels operates

in an unreasonable discrimination against Appellee and its property. (R. 544, 545, 546). The Court found that:

> "Such program of regulation operates to confiscate plaintiff's property and unreasonably discriminates against plaintiff, contrary to the due process and equal protection clauses of the Fourteenth Amendment * * * It is not necessary to prescribe and enforce such a program of regulation against plaintiff in the East Texas field in order to prevent physical waste of oil and gas, or for any other reason." (R. 549).

The Court further found that Appellee is "*currently suffering immediate and irreparable injury under such program of regulation, and so long as such program is maintained in force and effect, will continue to suffer irreparable injury,*" and that "*There was no substantial evidence to support the Commission's order and there was no showing made that the Commission had based the order on any finding, and there was no substantial evidence to support a finding upon which the order could be based.*" (R. 539, 540). As to the facts upon which such findings and conclusions were based, the lower court said in its opinion:

> "We think that the present injury to each of them is clear, practically admitted, and the only reply to it is that in the future, the injury under this order may be returned to them;" (R. 525).

and that:

> "*the reason for distributing three-fourths of the allowable on a flat basis per well or for distributing any of it on that basis is not precisely disclosed.*" (R. 526).

Appellee has always contended that allowables should be fixed by tracts and not by wells, and that a well is never a measure of the amount of oil underneath the tract, and Appellants' statement that Appellee admitted that some minimum for wells is necessary, is wholly without support in the record. Any statement that a well minimum is proper must be taken as based on the premise that under a reasonable and valid proration order, where tracts are either pooled or unnecessary wells are closed in, or the like, it may become advisable to give minimums to certain wells, and in such event, of course, Appellee would make no complaint, even though the granting of a minimum necessary to justify the expense of operation of a well would give such operator a little more than his fair share of the oil, since such excess would be insignificant. But it certainly was not the testimony of any witness that every well in the field should be given a minimum, and where a small town lot has as many as 5 wells on it, that each well should be permitted to produce profitably, while Appellee, with 5 wells on 25 acres, is given approximately the same amount of oil per day.

(4) Necessary wells can be reduced to as low as 5 barrels per day.

Admittedly, flowing wells can be operated for a profit on less than 5 barrels per day. (R. 547). The undisputed evidence in the record is that many wells that are now on the pump can be and are profitably operated on allowables as low as 5 barrels per day. (R. 105, 180, 227, 228, 230, 239, 240, 243-244, 266, 363, 436-438, 441-443, 545). Appellants argue that the 20

barrel minimum has already been reduced to 11.07 barrels per day, but such argument is misleading because if the marginal or pumping wells had been operating profitably at 5 barrels per day only four days a week, as found by the Court and *admitted by all witnesses*, by the same token it necessarily means that these wells have produced profitably on an average of 3 barrels a day. (R. 204, 545). The trial Court observed that it was quite apparent that the giving of 20 barrels to all wells necessarily draws upon the reservoir energy, all of which could be prevented, at least substantially, by reducing this allowance to 5 barrels per well, or preferably to 5 barrels per tract. (R. 545, 547). Wells on the west, producing 95% water, which admittedly creates waste, according to the engineers of the Commission, are operating profitably on an average of only 11 barrels, although the field was shut in three days a week, which means that they are producing over the week only six barrels per day. (R. 338, 339). These are the most expensive wells in the field to operate. The Commission's own schedules show that the east side so-called marginal wells have been producing profitably at an average of 11 barrels although formerly closed two to three days a week. This means that these wells must be operating profitably on as low as three to eight barrels per day. (R. 545). How can the Commission then in good grace argue that 20 barrels a day is necessary to prevent premature abandonment of wells? How can the Commission in good grace also argue that no matter how many unnecessary wells an operator may have as a result of the great density of his tract, he must be given a minimum for each well, rath-

er than for his lease, regardless of the fact that he has drilled unnecessary wells and is producing the oil of some one else? In order to show this Court the effect which such a reduction would have on the percentage of oil which might be allocated to the better wells, it may be observed that if the minimum were reduced to as low as 5 barrels on the 25,456 wells, there would be 15 times 25,456, or 381,840 barrels more of allocable oil which would insure even the unnecessary wells a reasonable return and stop to a great degree the present confiscation and discrimination. (R. 544).

Appellants try to make it appear that the witness Rowan did not testify on cross-examination that wells could be profitably pumped on 5 barrels per day. It had previously been testified and was so found by the Court that at the time of the trial, since wells paid out in two years at 20 barrels a day, most of the wells had been paid out. (R. 239, 547). On re-direct examination he testified as follows:

> "Q. So if these pumping wells have paid out, can they be operated and earn a substantial interest on the investment at 5 barrels to the well?
>
> "A. They can, yes, sir." (R. 215).

The Legislature has not delegated to the Commission the right to do anything but prevent waste and reasonably and equitably allocate the daily allowable. Certainly the Railroad Commission cannot indiscriminately and promiscuously grant permits and then guarantee the cost of the drilling and operation of the well at the expense of other operators who have not been so favored or who purchased their acreage wisely and prudently spaced and drilled their wells.

If an operator buys a small or poorly situated tract, there is no reason why his recovery should be at all out of proportion to the amount of his reserves or position on the structure. This Court has said:

> "In general, it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders." Penn Coal Company v. Mahon, 260 U. S. 293.

This is especially true in the oil business, where the operator usually acquires poor acreage either because of poor judgment or a lack of desire to invest more of his capital and buy larger and better situated acreage.

When a permit to drill is granted, the lease owner is given the right to drill his lease, and the full force of the law is spent. The permit does not carry with it any guarantee that the business venture will be profitable or that there is enough oil under the lease to make the drilling of the well profitable. When the lease owner has produced the recoverable oil under his lease, he has received all that the law entitles him to, although it may not equal in value the drilling costs. An attempt to give him more oil by the device of a proration plan is to take the property of one person and give it to another. The Commission must prorate the allowable on a reasonable basis, which means that it must not by its plan of proration, to make one person's operation profitable, give such person oil from the leases of other producers. (R. 544).

(5) The inequity of the so-called time element.

Appellants contend in their brief, and attempted to show by evidence of their witness, that even though Appellee is suffering injury at the present, the "time element" will take care of Appellee's situation. However, the most their own witness would say was "*I think they have a reasonable chance*" to get it (R. 372), and in effect his statement was merely his guess. (R. 388). The contention within itself acknowledges the existence of present injury to Appellee, and present injury has always been the fundamental basis for equitable relief under the laws of Texas and under the Constitution of the United States. In presence of existing injury, the Court is not required to speculate into the future in order to determine whether or not present damages may be overcome. As observed by one of the trial judges, "*to date is a fact, and in the future is a prophecy.*" (R. 429). The element of speculation is so remote until a man should not be told by any court that it will let him suffer because it believes that many years from now his suffering will be over.

This Court said, in *West Ohio Gas Company v. Public Utilities Commission*, 294 U. S. 79, 82, 83:

> "But prophecy, however honest, is generally a poor substitute for experience. 'Estimates for tomorrow cannot ignore prices of today.' * * * *Present confiscation is not atoned for by merely holding out the hope of a better life to come.*"

The fallacy of Appellants' argument, to our minds, is decisive of the issue of confiscation and discrimination in this case. Not one single expert witness used

by Appellants would deny that Appellee is suffering injury under the present plan of proration. (R. 355, 359, 407, 412), and having admitted present injury, Appellant's right to equitable relief against the continuation of such injury is clear. (R. 550). If the converse of this proposition were submitted, the Court would have been justified in finding that since Appellee is not suffering injury now, the Court cannot give Appellee relief because it might many years from now suffer some damage.

When the evidence shows that properties situated in the fairway, like Appellee's property, having the same sand conditions and position on the structure as Appellee's property, are permitted to produce 5 to 50 times as much oil as Appellee's property, and from 200% to 22,000% more oil per hundred acre feet of sand per day (R. 235), it is specious to argue that under such conditions operators like Appellee, who are permitted to produce so much less than their neighbors, will ultimately recover their oil. It is unreasonable to argue that with the east side being higher than Appellee's lease by 40 to 50 feet, as found by the Court (R. 546), and which, under the present plan, will eventually recover many times its amount of oil in place, that Appellee under such conditions will ultimately get its oil. (R. 547).

All the expert testimony in the world could not, upon sound and logical reflection, impress on the mind of even a layman the fairness and reasonableness of such a plan, and, in this connection, the Court said:

> "There is not any reasonable probability that the time element will take care of plaintiff under the present plan of proration. The producing sand

> to the east of plaintiff's lease is much higher than even the top of plaintiff's sand, and as the water approaches from the west, the oil under plaintiff's lease is being pushed upstructure to the east faster than plaintiff is allowed to produce.[18] * * * The abandonment of wells along the small band around the east side, due largely to fingerings of the sand into the shale, lack of oil in the first place, and mechanical equipment or method of completion, and abandonments on the west by water encroachment, will afford plaintiff no substantial relief." (R. 546, 547, 90, 394, 389-391, 398, 407).

By arguing that any substantial amount of abandonments will take place on the east side and that as a result thereof, there will be more allocable oil to be given later to Appellee, is an admission that the withdrawals on the east side are too high and that therefore the pressures will decline rapidly, causing these wells to go off production. Such an argument also loses sight of the fact that new wells are being completed all the time, that the allowable as the field becomes smaller will naturally decrease, and the amount of oil in the reservoir will be substantially less. (R. 398).

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[18]These findings and statements are not new, but are facts which courts have previously found, in connection with litigation of proration orders in this same field. In Peoples Petroleum Producers, Inc. v. Smith et al., 1 Fed. Supp. 361, the Court said:

> "Whereas, if the present condition is maintained, plaintiffs will lose oil to which they are entitled to the wells on the east, and long prior to the exhaustion of the oil and gas in the reservoir, the rise in the water will saturate plaintiff's wells, drowning them out, and the sands lying to the east will produce the oil which has been driven from plaintiffs' lands to them."

The Court further found;

> "If the present plan is continued, the effect of this movement will increase with time, and prevent plaintiff's recovering an amount of oil substantially equivalent to its original recoverable reserves or its present recoverable reserves;

and,

> "There is *no substantial evidence* to justify the Commission's permitting operators on the east and in other poorer sections of the field and on small or densely drilled tracts to produce disproportionately in reference to reserves and position on the structure now, *while plaintiff is required to wait an indefinite period of time (if ever) to get its oil.*" (R. 547).

No effort was made by Appellants to show why Appellee should be required to wait an indefinite period of time, if ever, to recover its oil, while other operators are permitted to recover, use, and enjoy their property now. (R. 539). In the Court's opinion, it was observed:

> "We think that the present injury to each of them is clear, practically admitted, and the only reply to it is that in the future, the injury under this order may be returned to them. We regard that contingency as so uncertain as to make it our duty to look principally to the present operation." (R. 524).

The loss in the past and in the future under the present plan the Court found would be many hundreds of thousands of barrels (R. 543, 548).

It is readily seen that the trial Court recognized Appellee's right to injunctive relief because of present

irreparable injury, and further recognized that a court is not justified in denying relief merely because it is contended that at some indefinite time the injury may cease.

Appellants say that Appellee has produced a substantial amount of oil and still has as much oil in place as ever. Appellants did not tell the Court, however, that Appellee does not have as much *recoverable* oil in place as ever. (R. 286-296, 328, 329, 538, 539). Oil in place and recoverable oil are entirely different. (R. 538). The water is pushing the oil eastward, and encroaching water pushes the oil up-structure to the east and takes its place. Thus when the water does reach Appellee's lease, it will gradually replace the oil, which is being moved eastward. (R. 217-227). Peoples, etc. v. Smith, supra. This migration to the east is taking place faster than Appellee is allowed to produce its oil. The trial Court found, therefore, that Appellee had already lost 20.25% of the estimated amount of the recoverable oil originally under its lease. (R. 538).

Appellants in this case have devoted much space in their brief in an attempt to discredit the testimony of their former engineer, Mr. Buck, due to the fact that his estimates of reserves in the field varied from those in the first case. The importance of this point is emphasized by reason of the fact that the estimate of such reserves constitutes in a large measure the property right of Appellee in and to the oil reserves under its lease. The Court's attention is called to the fact, however, that such witness readily explained the revision of the reserves estimated in this case, as compared to those in the first case. This is accounted for by the fact

that since the trial of the first case, he had had access to additional well logs and other data necessary in making such calculation, and he was using the same data as the Commission's engineer. (R. 224). Such revision was admitted by all to be relative and did not in any way affect the discrimination or confiscation as to Appellee, because any percentage of either increase or decrease in estimates of reserves would affect any other lease in the field to the same degree. The trial Court, in its findings of fact, found that such estimates changed from time to time, and that all the witnesses practically agreed on the amount of reserves.[19] Appellants seem to argue that if the reserves cannot be measured *exactly*, that no consideration at all should be given them. However, the decision in Brown v. Humble is to the contrary.

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[19](R. 536, 537). On this point, the Court's finding is as follows:

"It is likewise possible to determine with reasonable accuracy, actually and relatively, the quantity of oil per acre foot of net effective oil sand, and the quanitity of recoverable oil in the field and in the various leases in the field, assuming the conditions under which the field is to be operated. This is done continually for taxing authorities, loans, sales, and similar purposes. * * * Competent petroleum engineers and geologists substantially agree concerning the amount of oil in place per acre foot of net oil sand in the East Texas field."

"Such variances in estimated recovery, however, do not materially change the percentage which oil under plaintiff's lease bears to the total volume of oil in the field, because the changes are relative. The figures of the engineers of the Commission as to total estimated recovery per acre foot of sand in the field and as to the amount of oil in place under plaintiff's lease and the amount of oil in place in the field do not now vary substantially from those of plaintiff."

(6) The trial Court made no attempt to rewrite the order nor substitute its judgment for that of the Commission.

Appellants contend that the trial Court attempted to substitute its judgment for that of the Commission. Appellee trusts that this Court will not be misled by that statement. The trial Court was very careful to point out that it was not its duty either to suggest a formula or to substitute its judgment for that of the Commission. In this connection, we quote from the opinion of the trial Court as follows: *"It is not for us to suggest a proportion or a formula. We think the present proportion unsustainable."* (R. 527).

The trial Court grounded its judgment in this case upon the following bases: (1) That the administrative action was not supported by substantial evidence; (2) that the method of distributing the field allowable among operators was so unreasonable and arbitrary as that the plan (a) operated to take Appellee's property without due process of law and to deny to it the equal protection of the law, and (b) did not comply with the requirement of the Texas statute that the field allowable be distributed among the various producers on a reasonable basis. (R. 549, 550). The testimony was overwhelming, and we believe undisputed, at least the trial Court so found, and the Court further found that the particular plan of distributing the field allowable was not necessary to prevent waste, but on the contrary contributed to cause waste. (R. 550, 547, 548). It is enough to condemn as unreasonable the plan of distribution, to point out that in operation it permits cer-

tain operators to produce many times the amount of their original reserves, while other operators are allowed to produce only a fraction of their reserves. (R. 547, 540). Rational minds cannot differ concerning the proposition that a distribution is arbitrary and unreasonable which allows an operator with one well on one acre to produce substantially five times as much oil as a neighboring operator who has one well on five acres. Testimony of witnesses cannot avail to support as reasonable any such distribution. The trial Court did not substitute its judgment for that of the Commission, as contended by Appellants, but held the plan invalid on the bases above stated. (R. 546).

After determining that the distribution of allowables as far as Appellee was concerned, was inequitable, the trial Court said:

> "Is this result so unreasonable as to make the order contrary to the statute or the Fourteenth Amendment? The question under the two seems to be approximately the same. If the proration is unreasonable, the statute does not give the Commission the authority to make it. If it is so unreasonable as to be arbitrary, the Constitution does not permit it to be done either by the Legislature or the Commission." (R. 526).

We think this statement in the opinion of the trial Court clearly states the law as heretofore followed by this Court and all courts when the question of discrimination and confiscation becomes apparent.

(7) In determining the question of reasonableness of the order in question, this Court should follow the standard as set out by the Texas Courts.

Aside from the constitutional questions of confiscation and discrimination, an order of the Commission is void if it be determined that it does not distribute the allowable on a reasonable basis. The very language of the statute requiring distribution of the field allowable among the various operators on a reasonable basis shows that the Legislature had in mind the property rights of the various producers and the protection of such rights. "Reasonable basis" obviously refers to the property rights of the operators. A reasonable basis means one which recognizes the property rights of the various operators, not perfectly or precisely, but reasonably and substantially. (R. 527).

It can be demonstrated from the record without dispute and as a matter of law, as concluded by the trial Court, that under the plan of proration in question, the field allowable is not distributed among the various producers on a reasonable basis. The plan of proration in question, in effect, denies that a measure of property rights must be taken into account in distributing three-fourths of the field allowable. This is contrary to the statute, which requires that the field allowable be distributed among producers on a reasonable basis. The allocation of one-fourth of the allowable on the basis of property rights in no manner corrects the wrong of allocating three-fourths of the allowable in total disregard of property rights. The plan of proration in question disaffirms that which the statute requires. The plan of proration involved is, in

effect, an arbitrary affirmance that the lease owner is not entitled to any measurement of his property right resulting from differences in sand thickness, permeability, porosity, pressures, etc., as to three-fourths of the field allowable, and attempts to restate the rule of property in Texas to be that a lease owner's right is to that amount of oil which he may produce without waste, determined by the number of wells which he has drilled on his land, without regard to the differences in productivity of wells or drilling density of leases or any factor which measures the reserves of the owner. The plan amounts to an affirmance that one operator is not entitled to recover the reserves under his land, and that another operator, having drilled more wells than his neighbor, is entitled to recover more than the reserves under his land.

In determining the question of reasonableness in the sense used in the statute, these two issues are presented: (a) Does the standard of "reasonable basis" under the Texas statute open the same range of inquiry as the claim of a taking of property without due process? (b) May the local courts exercise an independent judgment on what is reasonable?

The Texas Courts have never directly passed upon the question as to whether or not the standard of "reasonable basis" under the statute here involved opens the same range of inquiry as a claim of taking of property without due process, but under similar statutes they have held that decisions of the Railroad Commission made in establishing rates, rules and orders in respect to carriers may be unreasonable and unjust and yet not amount to the taking of property without due process of law.

Railroad Commission of Texas v. H&TC Ry Co., 90 Tex. 340, 355; 38 S. W. 750, 752, 755, 756, involved statutes which allowed an appeal to the courts from orders of the Railroad Commission fixing rates, classifications, charges, etc., and provided that in the trial of such an appeal the burden of proof should rest upon the plaintiff, "who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, act or ges complained of are unreasonable and unjust to n or them." It was contended by the Railroad Commission in that case that the courts did not have power to review the action of the Commission unless the complainant showed that the act complained of amounted to a taking of property without compensation or without due process of law. The case came before the Supreme Court on certified questions from the Court of Civil Appeals. The second question submitted in the certificate was as follows:

> * * * "'If said commission has the power to adopt and enforce such rules and regulations, then had the court below, and has this or any other court, the power and jurisdiction to review the action of the commission in the premises, so as to determine whether such rules and regulations are reasonable, fair, and just, or otherwise, in the absence of any plea or proof that they amount to a taking of the railroad company's property without just compensation or without due process of law?'"

In discussing this question the Supreme Court of Texas said:

> * * * "The test to be applied to every such decision is that it shall not be unreasonable or un-

just to such railroad company or other person complaining. The great number of subjects to which this action may apply, and the fact that it may embrace all or any one of them, and may be instituted by any person interested for any cause which will show it to be unreasonable, manifests an intention on the part of the legislature to establish a much more liberal rule than previously existed upon this subject. The decision made in establishing rates, classifications, rule, charges, orders, or other regulation, might frequently be unreasonable and unjust, and yet might not amount to the taking of property without proper compensation, or without due process of law. Indeed, as to some persons who might be affected, and in the performance of some of the acts enumerated, the property would not be taken at all, and therefore the test which the attorney general would apply could not be applicable."

In answering the question the Supreme Court of Texas said:

"* * * In actions of this character, the courts will determine the question of the reasonableness and justice of any matter by the same rules as if it were an issue in other classes of suits, except as to the conclusive character of the evidence."

See also *GC&SF R. Co. v. Railroad Commission of Texas*, 102 Tex. 338, 116 S. W. 795.

The Texas courts have never directly passed upon the question as to whether or not they will exercise an independent judgment on what is "reasonable" under the statute here involved, but they have, in appeals from many other orders of the Railroad Com-

mission granting or refusing permits to drill wells[26] and in appeals from orders of the Railroad Commission granting or refusing permits to operate commercial trucks and busses on the highways[27] and in appeals from orders affecting rail carriers,[28] exercised independent judgment on the reasonableness of the orders.

Brown v. Humble, supra, involved an appeal from an order granting a permit to drill a well in exception to the general spacing rule. The language of the Supreme Court in the opinion written on motion for rehearing can only mean that on such an appeal the Court will exercise an independent judgment on the reasonableness of the order. The pertinent language is:

> "* * * This court will not undertake to prescribe any rule or standard to guide the Commission, except that its actions must be legal, reasonable and not arbitrary. * * *
>
> "* * * In exercise of its power to grant exceptions to its rules, it is the duty of the Commission to treat all interested parties justly, fairly and impartially under all the facts and circumstances of the case; and the actions and rulings of the Commission in attempting to accomplish such results will not be disturbed by the courts, unless they are clearly illegal, unreasonable, or arbitrary."

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[26]Railroad Commission v. Bass, supra; Falvey v. Simms Oil Co., 92 S. W. (2d) 292, 296; Gulf Land Company et al. v. Atlantic Refining Co. et al., 134 Tex. 59, 131 S. W. (2d) 73.

[27]Shupee v. Railroad Commission, 57 S. W. (2d) 295, 298, 73 S. W. (2d) 505; Smith et al. v. Wald Transfer & Storage Co., Inc., 97 S. W. (2d) 991, 995.

[28]Railroad Commission v. H&TC Ry. Co., 90 Tex. 340, 38 S. W. 750; GC&SF Ry. Co. v. Railroad Commission, 102 Tex. 338, 116 S. W. 795.

The Supreme Court, in the case of *Gulf Land Co. v. Atlantic Refining Company*,[26] also said:

> "* * * In administering our oil and gas conservation statutes, the Commission must be fair, and must not indulge in unreasonable discriminations between different oil fields, or between different tracts of land in the same oil field."

On the basis of the Texas holdings, we submit that it is the rule of the Texas Courts that they will exercise an independent judgment on the reasonableness of a Railroad Commission rule, questioned on an appeal from the Commission to the Courts; and that the standard of "reasonableness" under the statute involved in this case opens a wider range of inquiry than a claim of a taking of property without due process.

CONCLUSION

The issue in this case is very simple. All the fine distinctions with reference to the many facts reflected by the evidence and discussed by both Appellants and Appellee in their respective briefs may be disregarded and consideration given to the following facts, which stand out so far above all other issues in this case that they alone would constitute the basis for striking down as invalid the order in question. It is a matter of simple arithmetic to establish that Appellee, with one well to approximately four acres of land, could never recover as much of its oil reserves as the more densely drilled nearby tracts with as many as five wells on one acre of land, where field conditions, sand thickness, porosity, potential, and other material factors are substantially the same, and particularly is this true where the densely drilled lease is not as favorably situated as Appellee's lease. Where the Commission allows the producer with five wells to one acre substantially the same allowable per well as Appellee with only one well to approximately four acres, the resulting injury to Appellee is apparent without the aid of expert opinion. It naturally follows that producers on such densely drilled tracts are getting the oil of some other operator and producers on sparsely drilled tracts are not getting their own oil.

The undisputed evidence establishes that sand thickness, porosity, permeability, and pressures differ throughout the field and in the various sections thereof. Respective leases differ in amount of oil reserves as a natural consequence of the conditions shown by such undisputed facts. It then becomes obvious that to

reasonably distribute the field allowable, a plan of proration must take into account these differences in reserves, to the end that the respective producers may enjoy their property right which is recognized by the Courts to be an equal opportunity with others to recover for their respective leaseholds. With differences in density varying from one well to ten acres to as much as eight or ten wells to one acre, together with differences in pressure, sand thickness, porosity, and permeability, expert opinion is not necessary to show that any per well allocation of the field allowable will not result in production between producers on a reasonable basis. Expert opinion could not suffice to support such a discriminatory plan of distribution, had there been any such opinion in this case.

The only feature of the present order preventing waste is the fixing of the top allowable. Approximately three-fourths of the field allowable is distributed without *any* relation to differences in properties, and as a result, the best leases in the field are reduced to the level of the worst and the worst are raised to the level of the best. The order is in effect an attempt by the Commission to restate the rule of property in Texas to say that a leaseowner's right to produce oil is to be measured by the number of wells for which he may be able to obtain permits, and not the amount of oil that he has under his tract. Such an order is utterly destructive of the very theory of conservation, and deprives the good properties of the natural advantage which they have and shackles the operators of such good properties, while by force of an administrative order, producers of poor properties are allowed to take the oil

from the good properties. Such discrimination and unjust taking of the property of one man by another cannot be justified either in morals or law, and an administrative order that makes it possible does not even have the semblance of reasonableness and violates every concept of justice and law.

Wherefore, Appellee prays that the judgment of the trial Court be in all things affirmed by this Court, and that mandate be duly issued directing the lower Court to permanently enjoin Appellants from the further enforcement of this or any similar order.

Respectfully submitted,

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APPENDIX

(All Statutes Listed Below are Included in Texas Revised Civil Statutes, 1925, or Amendments as Indicated, and are Compiled in Volume 17 of Vernon's Annotated Civil Statutes of Texas)

Art. 6014. "Waste"

The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

(a) The operation of any oil well or wells with an inefficient gas-oil ratio, and the Commission is hereby given authority to fix and determine by order such ratio; provided that the utilization for manufacture of natural gasoline of gas produced from an oil well within the permitted gas-oil ratio shall not be included within the definition of waste.

(b) The drowning with water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership.

(h) Surface waste or surface loss, including the storage either permanent or temporary of crude petroleum oil, or the placing any product thereof, in open pits or earthen storage, and all other forms of surface waste or surface loss, including unnecessary or excessive surface losses, or destruction without beneficial use, either of crude petroleum oil or of natural gas.

(i). The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(j) The production of crude petroleum oil in excess of transportation or market facilities or reasonable market demand. The Commission may determine when such excess production exists or is imminent and ascertain the reasonable market demand.

The Commission may consider any or all of the above definitions, whenever the facts, circumstances, or conditions make them applicable, in making rules, regulations or orders to prevent waste of oil or gas.

Nothing in this Section shall be construed to authorize limitation of production of marginal wells, as such marginal wells are defined by Statute, below the amount fixed by Statute for such wells. (Acts 1919 p. 285; Acts 1929, 41st Leg., p. 694, ch. 313; Acts 1931, 42nd Leg., 1st C. S., p. 46, ch. 26, par. 1; Acts 1932,

42nd Leg., 4th C. S., p. 3, ch. 2, par. 1; Acts 1935, 44th Leg., p. 180, ch. 76, par. 2).

Art. 6029. Rules and Regulations

The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such a way as to confine crude petroleum oil, natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

(5) To prevent crude petroleum oil and natural gas and water from escaping from the strata in which they are found into other strata.

(6) To establish rules and regulations for shooting wells and for separating crude petroleum oil from natural gas.

(7) To require records to be kept and reports made.

(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to

prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

(9) To provide for the issuance of permits, tenders, and other evidences of permission when the issuance of such permits, tenders, or permission is necessary or incident to the enforcement of its rules, regulations, or orders for the prevention of waste. (Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C. S., p. 46, ch. 26, par. 15; Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2 par. 7; Acts 1935, 44th Leg., p. 180, ch. 76, par. 4).

Article 6049 c, Title 102, Revised Civil Statutes, * * *

Section 7. * * *

In the event any such rule, regulation or order which the Commission may adopt provides for the limitation or fixing of the production of crude petroleum oil, or of natural gas from wells producing gas only, in any pool or portion thereof, **the Commission shall distribute, prorate, or otherwise apportion or allocate, the allowable production among the various producers on a reasonable basis.** Acts 1935, 44 Legislature, p. 180, ch. 76, sec. 6).

Art. 6049d. Conservation of petroleum oil and natural gas; duties of Railroad Commission; anti-trust laws not to be affected.

Consideration in administration of act to consuming public.

Sec. 6-a. It is further provided that in the administration of this Act the Commission shall, at all times, take into consideration and protect the rights and interests of the purchasing and consuming public of crude

oil, and all of its products, such as gasoline, and lubricating oil; provided however, that if this Section be held for any reason unconstitutional the remaining sections of this Act shall, nevertheless, be valid; and it is declared that such remaining portions would have been included in this Act though this particular Section had been omitted. (As amended Acts 1935, 44th Leg., p. 180, ch. 76, Sec. 15).

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Brief for Appellee is acknowledged, this the 2nd day of December, 1940.

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Attorney for Appellants